NOTES OF CASES.

Discretion of Judge to Determine whether Answer Would Incriminate Witness.—In Ex parte Copeland, 240 S. W. Rep. 314, the Court of Criminal Appeals of Texas held that the naked assertion of a witness that an answer would tend to incriminate him does not entitle answer to be withheld, but the incriminating nature thereof must appear to the court; the question being one for the discretion of the judge.

The court said:

"Who is to decide whether the answer so withheld is or would be incriminating? In Ex parte Park, 37 Tex. Cr. R. 594, 40 S. W. 301, 66 Am. St. Rep. 835, this court said:

'Was the question of such a character, under the conditions then surrounding the defendant, as to other offenses of like character then pending against him, as would tend to criminate him as to said offenses? We hold that this matter is, in the first instance, to be determined by the court or judge; that is, "it must appear to the court from the character of the question and the other facts adduced in the case that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime. The liability must appear reasonable to the court, or the witness will be compelled to answer." See, Ex parte Irvine, 74 Fed. 954, which is an exhaustive discussion of this question, and the authorities there cited; Fries *v.* Brugler, 12 N. J. Law, 79, reported in 21 Amer. Dec. 52 and note on page 57; People *v.* Mather, 4 Wend. 229, reported in 21 Amer. Dec. 122, and authorities cited in note thereto. We quote from Whar Crim. Ev. § 466, as follows:

"To protect the witness from answering, it must appear from the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution. The witness, as will be seen, is not the exclusive judge as to whether he is entitled on this ground to refuse to answer. The question is for the discretion of the judge, and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. But, in any view, the danger to be apprehended must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency." Mr. Wharton further says (section 469):

"The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer. Thus a witness may be compelled to answer as to conditions which he shares with many others, though not as to conditions which would bring the crime in inculpatory nearness to himself. But, in brder to claim the protection of the court, the witness is not required to disclose all the facts, as this would defeat the object for which he claims protection. It is not, indeed, enough for the witness

to say that the answer will incriminate him. It must appear to the court, from all the circumstances, that there is a real danger, though this judge, as we have seen, is allowed to gather from the whole case, as well as from his general conception of the relations of the witness. Upon the facts thus developed, it is the province of the court to determine whether a direct answer to a question may criminate." And see authorities cited in notes to said sections. This rule has been followed in this state. See, Floyd *v.* State, 7 Texas, 215. After the court has determined from the environments and the nature of the case, so far as stated, that the answer of the witness might tend to criminate him, it is then the province of the witness to state whether or not a truthful answer to the question asked would tend to criminate him. See authorities, supra.'

As far as we know, the correctness of this announcement has not been questioned by this court, and, indeed, we think cannot be. Manifestly a claim that an answer is refused because criminating cannot be held as established by the naked assertion of such fact; and it is equally plain that to leave this master to the ipse dixit of a witness, who for one or all of many motives might not wish to give evidence, would be to withhold from the state all testimony of friends of the accused, or those who might be interested in defeating the ends of justice. In Ex parte Irvine (C. C.) 74 Fed. 960, Judge William H. Taft uses the following language:

'The second question is whether the statement of the witness that his answer to the question would criminate him was conclusive, so that the court could not compel an answer thereto. The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however, unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime. Mr. Wharton, in his work on Criminal Evidence (section 466), says:

" 'We have several rulings to the effect that a witness cannot be

compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be furthered. This proposition, however, cannot be maintained to its full extent, since there is no answer which a witness could give which might not become part of a supposable concatenation of incidents from which criminality of some kind might be inferred. To protect the witness from answering, it must appear, from the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution. The witness, as will presently be seen, is not exclusive judge as to whether he is entitled on this ground to refuse to answer. The question is for the discretion of the judge, and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. But, in any view, the danger to be apprehended must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency.'"

'In § 469 of the same work it is stated that the witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer. Numerous cases are cited in the notes in support of the proposition as stated in the text.'

The opinion of Chief Justice Marshall, of the Supreme Court of the United States, in the celebrated trial of the United States *v.* Burr, 25 Fed. Cas. p. 38, No. 14692E, establishes the correctness of this principal beyond controversy.

So we are in no doubt on the question that the court before whom the contemner refuses to answer must determine in the first instance the soundness of the contention that the answer would show or tend to show the witness penally connected with a crime. The trial court, in the instant case, has decided against relator."

False Labels on Underwear Subject to Prohibition by Trade Commission.—In Federal Trade Commission *v.* Winsted Hosiery Co., 42 Sup. Ct. 384, the Supreme Court of the United States held that where labels used by a manufacturer of underwear, designating the goods, which were made of wool mixed with cotton or silk, as "natural merino," "gray wool," "natural wool," "natural worsted," or "Australian wool," were false and misleading, and the Trade Commission found on sufficient evidence that dealers and consumers were deceived thereby, the use of such labels amounted to unfair competition against other manufacturers who correctly labeled their goods when they were not made of all wool, and use of such labels can be prevented by the Commission under Act Sept. 26, 1914, § 5 (Comp. St. § 8836c).

Mr. Justice Brandeis who delivered the opinion of the court said in part:

"The labels in question are literally false, and, except those which bear the word "Merino," are palpably so. All are, as the Commission